

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

UNITED STATES OF AMERICA,

Plaintiff,

:

Case No. 3:08-cr-175
also 3:11-cv-299

-vs-

District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

:

JEREMY E. LEWIS,

Defendant.

DECISION AND ORDER DENYING THIRD MOTION TO AMEND

This case is before the Court on Defendant's Third Motion for Leave to Amend in which he seeks to add a claim of ineffective assistance of appellate counsel for failure to file a timely direct appeal (Doc. No. 151).

Final judgment was entered in this § 2255 case on August 26, 2011 (Doc. No. 127). Defendant has taken an appeal from that judgment (Notice of Appeal, Doc. No. 135). Before this Court could allow amendment of the Motion to Vacate, it would have to reopen the judgment, relief which Defendant has not sought and which this Court cannot grant while the appeal is pending. But adding a new ground to a § 2255 motion to vacate by filing for relief from judgment is the legal equivalent of filing a second or successive motion to vacate. That cannot be done without the prior approval of the Court of Appeals because 28 U.S.C. § 2255(b) requires that approval.

Accordingly, Defendant's Third Motion for Leave to Amend is denied.

January 30, 2012.

s/ **Michael R. Merz**
United States Magistrate Judge